

Foncette v La Express
2001 NY Slip Op 30008(U)
October 12, 2001
Supreme Court, Kings County
Docket Number:
Judge: Theodore T. Jones
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At an IAS Term, Part 14 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of October, 2001

P R E S E N T:

HON. THEODORE JONES,

Justice.

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KAREN FONCETTE, as Administrator of the Goods, Chattels and credits which were of KENNETH FONCETTE, Deceased, WILMA FONCETTE, individually, MARLON FONCETTE, an infant, by his parent and natural guardian MARGARET BLAIR and JENNIFER FONCETTE, Individually,

Plaintiffs,

- against -

Index No. 18282/96

LA EXPRESS, LUIGI AVANA, JOHN DOE, President and owner of LA EXPRESS, same being a fictitious name,

Defendants.

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The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1, 2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers in this wrongful death case, plaintiffs Karen Foncette, Administrator of Kenneth Foncette's estate, Wilma Foncette, Marlon Foncette, by Margaret Blair and Jennifer Foncette ("plaintiffs" or collectively "Foncette"), move for an order granting the following relief: (1) pursuant to CPLR 3126(3), striking defendants' answer; (2) pursuant to CPLR 3103 for a protective order denying items 6, 7, 9, 14, 15 and 16 of defendants' notice for discovery and inspection, dated October 28, 2000; and (3) pursuant to CPLR 3402(a), granting plaintiffs leave to file a note of issue.

This case arose on June 6, 1994, when Kenneth Foncette, a mechanic, was killed while repairing a bus owned by defendants, when the allegedly faulty hydraulic jack ("jack") supporting the bus collapsed, causing the bus to crush him.

Motion To Strike Defendants' Answer

In support of their motion to strike defendants' answer for allegedly wilfully failing to comply with two court orders, and for defendants' purported destruction of the jack, plaintiffs allege that in an order dated July 11, 2000, the court directed defendants to produce the jack and give it to plaintiffs by August 1, 2000. In letters dated July 28, and August 3, 2000, plaintiffs' attorney reminded defendants' counsel that the court had ordered production of the jack by August 1, 2000, to no avail. In an order dated September 11, 2000, the court stated, among other things, that the discovery order dated July 11, 2000 (which contained the directive to turn over the jack to plaintiffs) was still in effect.

It is plaintiffs' position on this portion of the motion that they have been "irreparably harmed and prejudiced" by the loss and/or destruction of the hydraulic jack because they cannot have an expert inspect it.

In opposition to this portion of the motion, defendants allege that contrary to plaintiffs' position, the hydraulic jack was not the direct cause of the accident. In support of this contention, defendants submit the affidavit of bus driver Edward Skidmore. Skidmore stated that on the accident date, June 6, 1994, he was inside the bus, waiting at the bus stop, when the low air pressure buzzer inside the bus sounded. He telephoned defendant Avana, the owner and president of LA Express bus company, who told Skidmore to wait for a mechanic to arrive at the scene. Mechanic Kenneth Foncette responded, took a five-ton jack from his pick-up truck and placed the jack under the front passenger bumper of the bus. Skidmore stated that he heard Avana ask Mr. Foncette why he was placing the jack under the bumper, instead of behind the front passenger wheel, but Foncette did not respond. Mr. Foncette then went under the bus and began working on the problem. Skidmore heard a crash and observed that the bus had collapsed on Foncette. The jack was lying on its side with the piston extended, pointing towards the curb, with the base of the jack approximately in the same place where it had originally been placed. Avana released the valve on the jack, lowered the piston and repositioned the jack under the bus. Avana then jacked up the bus. Skidmore also stated that he did not see the jack itself fail, so as to cause the accident. When

the Fire Department responded to the scene, they too used the subject jack to further pump up the bus, in order to free Foncette from under it.

In further opposition, defendants claim that plaintiffs have done nothing to preserve, or seek to locate the subject jack. In this regard, defendants cite the fact that the summons and complaint were filed in the Kings County Clerk's Office on May 30, 1996, two years after the accident. Defendants also oppose the motion by stating that the November 22, 1996 response to plaintiffs' notice for discovery and inspection contained photocopies of the purported jack and that these photocopies are sufficient to satisfy the requirements for discovery.

Defendants also submit the affidavit of John Lindsay Anderson ("Anderson"), an investigator hired by defendants to find the subject jack. Anderson purportedly conducted an investigation which began on September 8, 2000, at the location of the former offices of New York Merchant Bakers Insurance Company ("the premises"), where the jack had allegedly been stored prior to the company's liquidation. Anderson ascertained from a written reference to the jack, dated February 9, 1995, that the jack had been at the premises at that time. Anderson further stated that changes had occurred at the premises, but Anderson conducted a search anyway. The jack was not found.

CPLR 3126 provides that a court may, in its discretion, impose various sanctions upon a party for the party's refusal to obey "an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." The statute's

proposed penalties are not intended to be exhaustive (DiDomenico v C&S Aeromattick Supplies, Inc., 252 AD2d 41, 49). One of the penalties set forth in the statute allows the court to strike the offending party's pleadings (CPLR 3126[3]). In order to exercise this discretion, the court must find that the party wilfully, contumaciously, or in bad faith failed to comply with a discovery order or destroyed evidence prior to an adversary's inspection (id., at 52; Puccia v Farley, 261 AD2d 83). "Generally, 'wilfulness' can be inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults" (DiDomenico v C&S Aeromattick Supplies, Inc., supra, at 52; Espinal v City of New York, 264 AD2d 806, 806) (citations omitted).

A spoliator of key physical evidence can also be punished by the court by striking its pleadings. This sanction can be imposed even if the destruction of key evidence occurred by negligence, rather than wilfulness (DiDomenico v C&S Aeromattick Supplies, Inc., supra, at 53).

In the case at bar, defendants were directed by this court to give the subject jack to plaintiffs by August 1, 2000. This directive to produce the jack was reaffirmed in this court's September 11, 2000 order. In spite of written requests by plaintiffs and these two orders, the jack has not been provided to plaintiffs and is apparently lost or destroyed. In either case, the jack can never be inspected by plaintiffs or their expert. Therefore, prejudice to plaintiffs is apparent. Indeed, the importance of the jack has been recognized by

defendants. In their response, dated November 11, 1996, to plaintiffs' notice for discovery and inspection, defendants annexed thereto photocopies of the jack which allegedly was involved in the accident. These photocopies have been viewed by the court and the court finds them to be totally useless. First, the copies are so unclear and dark, it is extremely difficult to ascertain the nature of the item allegedly depicted in them. Second, the purpose of this type of discovery is to permit the party seeking it to be able, if they choose, to have an expert examine the item sought. These photocopies obviously do not provide that option. Defendants also submit the affidavit of investigator Anderson to show that the jack had been misplaced/lost sometime in 1995, or thereafter. Anderson stated that he began his search for the jack on September 8, 2000 at the place where the jack had been stored, although this location had undergone many changes during the years since the jack was there. The investigator did concede that there was written evidence at the location that the jack was at the premises on February 9, 1995, but was no longer at that location. Anderson's investigation therefore shows that the jack was, at one time, at that location and was in defendants' possession and control.

Defendants claim that the jack was owned by decedent and, therefore, they are not responsible for it. This allegation is refuted by the deposition testimony of plaintiff Karen Foncette, decedent's daughter, that decedent did not own a hydraulic jack. No evidence to the contrary has been submitted by defendants.

For the reasons set forth herein, the court finds that the jack is missing due to defendants' failure to preserve its existence. The court also finds that defendants have disregarded two court orders to give the jack to plaintiffs, and failed to provide a reasonable excuse for its disappearance. Therefore, defendants' answer is stricken (see, Herrera v City of New York, 238 AD2d 475, 476).

Motion For a Protective Order (CLR. 3103[a])

In their notice of discovery and inspection, dated October 28, 2000, defendants seek, in relevant part, the following items: (a) Item #6, authorizations for the release of decedent's federal income tax returns for the years 1989 through 1994, along with copies of two forms of identification, one of which must be a photographic identification; (b) Item #7, seeks authorizations for the release of federal income tax returns of Karen Foncette (the decedent's daughter) for the years 1992 through 1994; (c) Item #9, authorizations for the release of Ms. Foncette's employment records from New York Life Insurance Company; (d) Item #14, authorizations for the release of decedent's employment, benefit and pension records from the company known as "Thompson Bonney"; (e) Item #15, authorizations for all records kept by the trade union to which decedent was a member; and, (f) Item #16, any and all union records of the decedent that are in plaintiffs' possession. These requests are claimed by plaintiffs to be beyond the scope of discovery, overly broad, burdensome, and vague.

Defendants oppose plaintiffs' request for a protective order on the following grounds: Karen Foncette purportedly testified at her examination before trial that she has been

deprived of income because of Kenneth Foncette's death. Moreover, Mr. Foncette was allegedly an independent contractor bus mechanic providing services to several bus companies, his income records are allegedly therefore necessary for the six years preceding his death. Decedent's employment, benefits and pension records from the company known as "Thompson Bonney" are also requested because decedent's length of employment with this company purportedly could not be specified by plaintiffs. The requests for decedent's trade union records are allegedly needed to determine pension benefits and other benefits to which decedent was entitled prior to his death.

It has generally been held that the disclosure of tax returns, because of their confidential nature, should be limited to situations where the party requesting them can prove that the information contained in the returns is "indispensable" to the litigation and that they are unavailable from any other sources (Slate v State of New York, 267 AD2d 839, 840). The defendants' request for the release of decedent's and Karen Foncette's income tax returns is denied and plaintiff's request for a protective order is granted as defendants have failed to prove the required elements. Also denied is the request for Karen Foncette's employment records, as this request has not been shown to be relevant to the instant case. Item #14 is granted only to the extent that plaintiffs must state, if and when, decedent worked for "Thompson Bonney". Plaintiff must also provide defendants with information and/or documents concerning decedent's income, such as a W-2 form, and any information regarding his pension rights while employed by "Thompson Bonney". Items

#15 and #16 are granted only to the extent that plaintiffs must provide information concerning decedent's union affiliation, if any, and his rights, if any, to a pension pursuant thereto. Otherwise, defendants' requests are denied and a protective order, pursuant to CPLR 3103, is granted as to these items.

Note of Issue

Plaintiffs are granted leave to file a note of issue.

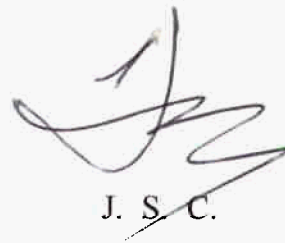
It is therefore,

ORDERED, that plaintiffs' motion for an order striking defendants' answer is granted, and it is further

ORDERED, that a protective order is issued as to defendants' discovery requests as stated herein, and it is further

ORDERED, that plaintiffs are granted leave to file a note of issue.

E N T E R,



J. S. C.

HON. THEODORE T. JONES